UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, et al. v. FAIRFIELD GREENWICH LIMITED, et al.	Master File No. 09 CV 0118 (VM) 09 CV 5012 (VM) (Morning Mist Action) 09 CV 2366 (VM) (Ferber Action) 09 CV 2588 (VM) (Pierce Action)

MORNING MIST PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO VACATE CONSOLIDATION ORDER AND TO APPOINT MOVANTS' COUNSEL AS CO-LEAD DERIVATIVE COUNSEL

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INTRODUCTION

Morning Mist Holdings Limited and Miguel Lomeli, plaintiffs in the *Morning Mist* derivative action, 09 CV 5012, respectfully submit this memorandum in support of their motion to vacate the consolidation of this action with the class action litigation, *Anwar v. Fairfield Greenwich Limited*, 09 CV 0118.[1]

By Order dated June 9, 2009 ("Consolidation Order"), the Court consolidated *Morning Mist* with *Anwar* for pretrial purposes.[2] As shown below, the Consolidation Order should be vacated because, among other things, plaintiffs' counsel in the *Anwar* class action have a profound conflict with respect to the *Morning Mist* derivative claims. To address this conflict and facilitate the effective prosecution of the derivative litigation, the Court should also appoint plaintiffs' counsel in the derivative cases as Co-Lead Derivative Counsel.

FACTUAL BACKGROUND

On May 15, 2009, plaintiffs, shareholders of nominal defendant Fairfield Sentry Limited ("Fund"), filed a derivative complaint on behalf of the Fund.[3] The complaint alleges, *inter alia*, that defendants breached their fiduciary duties to the Fund by mismanaging its assets -- which were invested with Bernard Madoff and his firm, Bernard L. Madoff Investment Securities, LLC. It is believed that billions of dollars of the Fund's assets have been lost.

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[1] Pursuant to the Court's Order dated January 30, 2009, a party may file "an application for relief" from consolidation within 15 days following notification of consolidation. *See* Dkt. 40 ¶ 7. Unless otherwise noted, references to Docket Numbers ("Dkt.") are to 09 CV 0118.

[2] Dkt. 167; Dkt. 11, 09 CV 5012 (consolidating cases "for all [pretrial] purposes") (brackets in original).

[3] Dkt. 1, 09 CV 5012. The case, originally filed in New York state court, was removed to this Court, and plaintiffs have moved to remand. The undersigned counsel also represent plaintiffs in the two other derivative cases before the Court, *David I. Ferber SEP IRA v. Fairfield Greenwich Group*, 09 CV 2366 (VM) and *Frank E. Pierce v. Fairfield Greenwich Group*, 09 CV 2588 (VM), and have previously filed motions to remand and vacate consolidation orders in those cases.

At a time when the only actions in *Anwar* were class actions, the Court designated the three law firms representing the class plaintiffs as interim class counsel ("Interim Class Counsel") pursuant to Federal Rule of Civil Procedure 23(g)(3). Although the role of Interim Class Counsel under Rule 23(g)(3) is circumscribed and limited to the prosecution of the class claims (and then only until the class certification motion is decided), defendants improperly are treating Interim Class Counsel as counsel for *all* claims -- including the derivative claims[4] -- and have even entered into agreements with Interim Class Counsel that purport to bind the derivative plaintiffs as well.

To avoid further misunderstandings and Interim Class Counsel's conflicts concerning the derivative claims, the Court should vacate the Consolidation Order and appoint movants' counsel as Co-Lead Derivative Counsel. Such a structure will avoid the ongoing prejudice to the derivative plaintiffs, isolate Interim Class Counsel from the derivative claims and ensure the fair and effective prosecution of the derivative claims, while facilitating efficiencies that may be achieved through coordination of pretrial activities with the class action cases, including discovery, where appropriate.[5]

[4] Letter of Mark G. Cunha, Esq. to the Court, dated June 9, 2009, at 2 (claiming that Interim Class Counsel "has clear authority to act on behalf of plaintiffs in the Consolidated Derivative Cases ….").

[5] Much of the discovery in the class litigation will be irrelevant to the derivative litigation. For example, it is likely that a significant amount of discovery for the class certification motion (including discovery of the named class plaintiffs and expert witnesses) will focus on whether there was an "efficient" market for each of the various securities and whether putative class members "relied" on defendants' statements for purposes of their federal securities claims. *See generally In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41-43 (2d Cir. 2006); *In re Livent, Inc. Noteholders Sec. Litig.*, 211 F.R.D. 219, 222-23 (S.D.N.Y. 2002) (Marrero, J.). Pursuant to

[footnote continued]

ARGUMENT

I. THE COURT SHOULD VACATE THE CONSOLIDATION ORDER

A. The Standard For Consolidation

Federal Rule of Civil Procedure 42(a) governs consolidation. Under the rule:

> If actions before the court involve a common question of law or fact, the court may:
>
> (1) join for hearing or trial any or all matters at issue in the actions;
>
> (2) consolidate the actions; or
>
> (3) issue any other orders to avoid unnecessary cost or delay.

Fed. R. Civ. P. 42(a).

The proponents of consolidation bear the burden to demonstrate that consolidation is appropriate. *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373-74 (2d Cir. 1993) (vacating consolidation); *MacAlister v. Guterma*, 263 F.2d 65, 70 (2d Cir. 1958) (affirming lower court's denial of Rule 42(a) pretrial consolidation and appointment of "general counsel"). To meet their burden, the proponents must demonstrate "compelling circumstances" warranting consolidation. *Id*. at 69.

The burden cannot be met where the prejudice to a party outweighs the benefits of consolidation. *Garber v. Randell*, 477 F.2d 711, 714 (2d Cir. 1973); *Webb v. Goord*, 197 F.R.D. 98, 101 (S.D.N.Y. 2000) (Marrero, J.) (benefits of consolidation "cannot be pursued at the sacrifice of fairness to all the parties"). Moreover, efficiencies obtainable from consolidation are not enough to warrant consolidation; instead, the Court must evaluate whether "savings of

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the March 11, 2009 Scheduling Order, 90 days has been allocated to class certification discovery. *See* Dkt. 69 ¶ 12.

expense and gains of efficiency can be accomplished without sacrifice of justice." *Devlin v. Transportation Commc'ns Int'l Union*, 175 F.3d 121, 130 (2d Cir. 1999) (citation omitted).

Finally, consolidation is inappropriate where potential benefits can be achieved by procedures short of "consolidation" -- including coordinated pretrial discovery. *See MacAlister*, 263 F.2d at 70 (consolidation inappropriate where there were "[m]any avenues of relief … to forestall the possible confusion and duplication," including coordinated discovery); *Repetitive Stress*, 11 F.3d at 374. As shown below, the standard for consolidation is not met here.

B. The Derivative Action Should Not Be Consolidated With The Class Action

Even in otherwise related cases, consolidation of derivative cases and class cases -- even for pretrial purposes -- is not appropriate. As Judge Sweet recently explained in refusing to consolidate derivative and federal securities class actions:

> [W]hile federal securities and derivative claims have occasionally been consolidated for pre-trial purposes, *see Glauser v. EVCI Center Colleges Holding Corp.*, 236 F.R.D. 184, 186 (S.D.N.Y. 2006); allowing these actions to proceed separately appears to be the more common approach. *See, e.g., Merrill Lynch*, No. 07 Civ. 9841 (LBS) (S.D.N.Y. Mar. 12, 2008); *In re Citigroup Inc. S'holder Derivative Litig.*, No. 07 Civ. 9841 (S.D.N.Y. Aug. 22, 2008). Following the path taken by these courts, this Court has determined that at this time, the Derivative Action should not be consolidated with the Securities Actions. The fact that these Actions are not consolidated, however, does not prevent their reasonable coordination for pretrial purposes.

In re Bear Stearns Cos. Sec., Derivative, and ERISA Litig., 08 MDL 1963, 2008 U.S. Dist. LEXIS 106327, *19-20 (S.D.N.Y. Jan. 5, 2009). *See also In re Centerline Holding Co. Sec. Litig.*, 08 CV 505, 2008 U.S. Dist. LEXIS 36406, *9 (S.D.N.Y. May 5, 2008) (Scheindlin, J.) (denying motion to consolidate securities class action and derivative cases, but coordinating cases for pretrial purposes, noting: "Lead plaintiff in the Securities Actions could not reasonably be expected to represent adequately the interests of the Derivative plaintiffs.").

Even apart from the accepted practice favoring separate treatment of derivative and class cases (even for pretrial purposes), additional factors here, including the Interim Class Counsel's already-exposed conflict with respect to the derivative claims and the resulting prejudice to those claims, warrant withdrawal of the Consolidation Order.

1. Interim Class Counsel Are Conflicted With Respect To The Derivative Claims

Consolidation here has already created an impermissible conflict on the part of Interim Class Counsel. Under well-settled law, derivative claims should be prosecuted by separate, derivative counsel. *See St. Clair Shores Gen. Employees Ret. Sys. v. Eibeler,* 06 CV 688, 2006 U.S. Dist. LEXIS 72316, *23 (S.D.N.Y. Oct. 4, 2006) ("Courts in this Circuit have long found that plaintiffs attempting to advance derivative and direct claims in the same action face an impermissible conflict of interest.") (citing authorities); *Ruggiero v. American Bioculture, Inc.*, 56 F.R.D. 93, 95 (S.D.N.Y. 1972) (ordering separate counsel for class and derivative claims, noting that "there is a substantial question as to whether the attorneys for the Freed plaintiffs can represent them in the derivative suit and the class action without violating the Canons of Ethics").[6]

[6] *Accord, Priestly v. Comrie*, 07 CV 1361, 2007 U.S. Dist. LEXIS 87386, *18 (S.D.N.Y. 2007) (courts in the Second Circuit "'have long found that plaintiffs attempting to advance derivative and direct claims in the same action face an impermissible conflict of interest'"; plaintiff's "attempt to advance derivative and direct claims in the same action is an impermissible conflict of interest that disqualifies her from maintaining this action") (citations omitted); *Tuscano v. Tuscano*, 403 F. Supp. 2d 214, 223 (E.D.N.Y. 2005) ("Any individual claims raised by a shareholder in a derivative action present an impermissible conflict of interest."); *Wall Street Sys., Inc. v. Lemence*, 04 CV 5299, 2005 U.S. Dist. LEXIS 2006, *3 (S.D.N.Y. Feb. 8, 2005) (dismissing derivative claims with prejudice, explaining that shareholder "has a conflict of interest, and therefore cannot adequately represent other shareholders, when he simultaneously brings a direct and derivative action"); *Brickman v. Tyco Toys, Inc.*, 731 F. Supp. 101, 109 (S.D.N.Y. 1990) ("plaintiff's motion for class certification is denied as he cannot maintain that suit and his derivative action simultaneously"); *Kammerman v. Steinberg*, 113 F.R.D. 511, 516 (S.D.N.Y. 1986) (denying class certification: plaintiffs' prosecution of class and derivative

[footnote continued]

The Court's January 30, 2009 order ("January Order") appointing Interim Class Counsel does not address the conflict.[7] That order was issued *before* any of the derivative suits were filed. Moreover, the order by its terms does not apply where, as here, plaintiffs have objected within the allotted 15-day period following the consolidation of their case.[8]

Additionally, Interim Class Counsel's designation necessarily relates only to their prosecution of class action claims under Rule 23; accordingly, they have no authority to direct the derivative claims. Under Rule 23, a court appoints "interim counsel" to protect the putative class' interest prior to the actual class certification decision. *See* Fed. R. Civ. P. 23(g)(3) ("The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action."); *see In re Municipal Derivatives Antitrust Litig.*, 252 F.R.D. 184, 185-86 (S.D.N.Y. 2008) (Marrero, J.). Unlike Rule 23, the rule governing derivative litigation provides for no "interim counsel" designation. *See* Fed. R. Civ. P. 23.1.

Here, the January Order designating Interim Class Counsel was expressly issued "[p]ursuant to" Rule 23(g)(3).[9] Indeed, in their application for appointment as Interim Class

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claims "presents an impermissible conflict of interest"). *See also Levine v. American Export Indus., Inc.*, 473 F.2d 1008, 1009 (2d Cir. 1973) (dismissing interlocutory appeal from order consolidating class action and derivative cases for pretrial purposes, but noting that "[i]n the event that a conflict of interest looms upon the horizon, the appointment of separate counsel for each group (class and derivative plaintiffs) may well be advisable.") (citing *Ruggiero*); *Glauser v. EVCI Career Colleges Holding Corp.*, 236 F.R.D. 184, 186 (S.D.N.Y. 2006) (consolidating derivative action with six class actions only for "discovery purposes," but appointing lead counsel under PSLRA *solely* for the class actions); *Ryan v. Aetna Life Ins. Co.*, 765 F. Supp. 133, 135 (S.D.N.Y. 1991) ("[C]ourts in this District have applied a strict standard in scrutinizing simultaneous direct and derivative actions for signs of conflict.") (citations omitted).

[7] *See generally* Dkt. 40 ¶ 12.

[8] Dkt. 40 ¶ 7.

[9] Dkt. 40 ¶ 12.

Counsel, class counsel explicitly invoked Rule 23(g)(3), telling the Court that their appointment as "INTERIM CLASS COUNSEL" was "IN THE BEST INTERESTS OF THE CLASS."[10]

Pursuing their role under Rule 23(g)(3), Interim Class Counsel presumably have acted to advance the interests of their class; however, they have *never* undertaken to assert the derivative claims. Moreover, in pursuing the class' interest, Interim Class Counsel have acted *adversely* to the derivative claims. The following examples illustrate the point.

a. Delaying the Derivative Claims

Interim Class Counsel have negotiated with defendants -- without the prior knowledge or approval of derivative counsel -- a stipulation that grants Interim Class Counsel the right to file a Second Consolidated Amended Complaint ("SCAC") on some future, unspecified date. Importantly, for purposes here, it purports to grant defendants a delay of 45 days thereafter to respond to "any complaint" (including, arguably, the derivative complaints).[11] This open-ended extension, which if applicable could well delay *by many months* defendants' time to respond to

[10] Dkt. 22 at 4, § II (heading); *see id*. at 6 (noting desirability of counsels' consensus regarding "Interim Class Counsel"); *id*. at 7 (describing criteria for selection of "interim class counsel); Jan. 15, 2009 Hearing Tr. at 32, line 5 (Dkt. 22-2) (proposing appointment as "interim class counsel").

Although class counsel told the Court that their interim appointment would "promote efficient prosecution of this action *pending the determination of class certification*," *see* Dkt. 22 at 5 (emphasis added), they submitted to the Court (and the Court approved) an Order granting their requested appointment *and* authority for the post-class certification period as well, including "sole authority" to conduct "trial and post-trial proceedings, "any settlement negotiations with Defendants," and "other matters concerning the prosecution and/or resolution of the consolidated actions." *See* Dkt. 40 ¶ 14(b, f, g); Dkt. 21-2.

[11] Dkt. 168 ¶ 2.

the derivative complaints, is prejudicial to the derivative cases and undermines Interim Class Counsel's own professed concern for "the need to move quickly in the litigation."[12]

b. Securities Fraud Claims

Interim Class Counsel intend to assert federal securities fraud claims if they are selected lead counsel under the Private Securities Litigation Reform Act ("PSLRA").[13] Their contention that defendants committed federal securities fraud (with the requisite scienter), however, could well prove detrimental to the derivative claims against various defendants, including auditing firm PricewaterhouseCoopers LLP ("PwC"), whom the *Morning Mist* plaintiffs have sued in the derivative case, but whom the Anwar plaintiffs have *not* named in their consolidated class action complaint. PwC likely would contend that *it* was a victim of the very fraud that the Anwar plaintiffs claim was committed by the defendants named in their class action suit. Thus, if the derivative case were litigated by Interim Class Counsel, the claims against PwC and others could be jeopardized.

c. PSLRA Discovery Stay

Interim Class Counsel have stated that the assertion of federal securities claims in the class action implicates the PSLRA discovery stay, 15 U.S.C. § 78u-4(b)(3)(B). Indeed, they claim that they originally chose *not to* assert federal securities claims due to, *inter alia*, "the potential application of the discovery stay under the PSLRA."[14] Although Interim Class Counsel had concluded that asserting federal securities claims "was not in the best interests of the class" and that there was "uncertainty as to whether federal securities claims would add value over the common law claims already asserted" by them,[15] they have now flipped 180 degrees and seek to assert federal securities claims in the SCAC.[16] For their part, defendants say that the not-yet-filed SCAC requires a stay of all discovery *now* -- including discovery in the derivative litigation -- and defendants have refused to comply with their discovery obligations in the derivative litigation.[17]

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[12] Dkt. 134 at 4.

[13] Dkt. 163 at 3 ("the Anwar Plaintiffs have determined, if appointed lead plaintiff, to assert the federal securities claims in a further amended complaint").

[14] Dkt. 134 at 4.

The PSLRA discovery stay is inapplicable to the *derivative* claims.[18] Nonetheless, Interim Class Counsel -- without the prior knowledge, consent or participation of plaintiffs' counsel in the derivative cases -- submitted a "Joint Rule 26(f) Discovery Plan" that purports to delay defendants' initial disclosure obligations until after the Court rules on the PSLRA discovery stay issue, and even to postpone briefing on the issue until *after* the filing of the SCAC.[19] Based upon that Plan, there is no doubt that defendants will continue to delay their initial disclosures in the derivative cases. That fact alone underscores the prejudice to the

[15] Dkt. 134 at 4.

[16] Dkt. 163 at 3.

[17] *See, e.g.*, Dkt. 157 at 2 ("Defendants will provide initial disclosures if and when required under applicable law, or by order of this Court, *after disposition* of the PSLRA stay issue ….") (emphasis added); Letter of Mark G. Cunha, Esq. to the Court, dated June 5, 2009, at 2 (referencing defendant PwC's position that its "initial disclosures" are not due).

[18] *See In re FirstEnergy Shareholder Derivative Litig.*, 219 F.R.D. 584, 586-87 (N.D. Ohio 2004); *see generally Tobias Holdings, Inc. v. Bank United Corp.*, 177 F. Supp. 2d 162, 167 (S.D.N.Y. 2001).

[19] Dkt. 157 at 2 ("Defendants will provide initial disclosures if and when required under applicable law, or by order of this Court, *after disposition* of the PSLRA stay issue ….") (emphasis added).

derivative plaintiffs that has already resulted from consolidation and Interim Class Counsel's adverse actions.

d. Class Definition

Interim Class Counsel have defined their class in a way that excludes the Fund (which, they claim, was controlled by various defendants).[20] The Fund, however, is the entity on whose behalf the *Morning Mist* derivative action has been brought, thus again highlighting the Interim Class Counsel's conflict with respect to the derivative claims.

e. Derivative v. Class Claims

There is a substantial question whether the claims asserted in the class action are legally cognizable and, if so, whether they may be asserted given the pendency of the derivative claims. *See Continental Cas. Co. v. PricewaterhouseCoopers, LLP*, 57 A.D.3d 411, 869 N.Y.S.2d 506, 507 (1st Dep't 2008) ("Even if plaintiff limited partners' claims of fraudulent inducement are sufficient, as a legal matter, to support a direct claim against the partnership's auditor, … they failed to submit evidence to raise an issue of fact in opposition to defendant's prima facie showing that the damages claimed all emanated from losses that took place after the initial investment, did not affect plaintiffs differently from other limited partners, *and were therefore derivative* ….") (emphasis added) (citations omitted); *Kramer v. Western Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) ("Delaware courts have long recognized that actions charging 'mismanagement which depress[] the value of stock [allege] a wrong to the corporation; *i.e.*, the stockholders collectively, to be enforced by a derivative action.'") (brackets in original, citations omitted). Those issues inevitably will play out in future motions to dismiss. For present

[20] *See* Dkt. 116 ¶¶ 2-3, 157, 197-98 (*Anwar* Consolidated Amended Complaint).

purposes, however, the issues underscore the conflict faced by Interim Class Counsel with respect to the derivative claims.

f. Liquidation Proceedings

Clients of Interim Class Counsel have recently initiated proceedings in a foreign court to liquidate the Fund.[21] Those actions necessarily conflict with the derivative litigation, which seeks to benefit the Fund. *See Ryan*, 765 F. Supp. at 136 ("[T]he corporation, whether healthy or not, remains in existence and can benefit from a recovery in the derivative action.").

* * *

The foregoing illustrates the conflicts already confronting Interim Class Counsel in respect of the derivative litigation. These conflicts require that Interim Class Counsel (and class plaintiffs) have no role with respect to the derivative claims, even for pretrial purposes. *See generally Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627-28 (1997) (class plaintiffs' conflicts precluded pretrial settlement).

2. Consolidation Violates The "No-Merger" Rule

Deconsolidation also is warranted because the Consolidation Order runs afoul of the "no-merger" rule articulated by the Supreme Court in *Johnson v. Manhattan Railway Co.*, 289 U.S. 479 (1933):

> [C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or *change the rights of the parties*, or make those who are parties in one suit parties in another.

289 U.S. at 496-97 (emphasis added). *See also Garber*, 477 F.2d at 716 (quoting *Johnson*); *Zdanok v. Glidden Co.*, 327 F.2d 944, 950 n.6 (2d Cir. 1964) (same).

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[21] *See* Letter of Robert C. Finkel, Esq. to the Court, dated April 24, 2009, at 2.

Under the no-merger rule, consolidation of these derivative and class cases is inappropriate. *See Garber*, 477 F.2d at 716 (on interlocutory appeal by defendant in derivative action (W & C) of order which consolidated derivative and class cases for pretrial purposes and required filing of consolidated complaint, reversing order to the extent it required consolidated complaint; explaining that the consolidation order, "although purporting to be for 'pretrial purposes,' went beyond mere consolidation of the three suits for such purposes. In addition it directed the filing of the Consolidated Amended Supplemental Complaint, which superseded the complaints filed in the three separate actions. It further appears that the effect of this consolidation may be to cause serious prejudice to W & C."); *MacAlister v. Guterma*, 263 F.2d 65, 69 (2d Cir. 1958) (district court had no authority to order consolidated complaint, explaining: "Such an order would tend to merge the various actions in disregard of the caveat expressed in Johnson v. Manhattan Ry. Co.") (citation omitted); *Journapak Corp. v. Bair*, 27 F.R.D. 509, 511 (S.D.N.Y. 1961) ("It is doubtful whether this Court is invested with power to order a consolidated complaint.").

The no-merger rule implicates concerns of special significance here. For example, defendants have taken the nonsensical position that, due to consolidation, "[n]o response to the complaints in the Consolidated Derivative Cases is required."[22] Moreover, as noted above, defendants already have refused to provide discovery in the derivative cases, based solely on the possibility that that Interim Class Counsel will file the SCAC, adding federal securities claims.

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[22] Letter of Mark G. Cunha, Esq. to the Court, dated June 9, 2009, at 2. Defendants' position is disingenuous, and flatly ignores the Court's March 31, 2009 Order regarding the *Pierce* derivative action. *See* Dkt. 83 (Memo-Endorsed Order on Letter of Mark G. Cunha, Esq. to the Court, dated March 31, 2009, at 2: "The time for defendant(s) to answer or otherwise move with respect to the complaint in this action is extended to the time due pursuant to the terms of the Consolidated Order herein."). The March 31 Order was issued in response to Mr. Cunha's request that the Court "confirm[] that a response to the *Pierce* complaint *is not due, or, in the alternative, extending the defendants' time* to respond to the *Pierce* complaint to the date that their response is due to the Consolidated Complaint." *Id.* (emphasis added).

Absent a withdrawal of the Consolidation Order, plaintiffs face the prospect that their derivative claims will be frozen, perhaps for years, and that even discovery of the common defendants in the derivative and class cases will be delayed for many months. These results are prejudicial to the derivative claims, and undermine the goals of the no-merger rule.

II. MOVANTS' COUNSEL SHOULD BE DESIGNATED AS CO-LEAD DERIVATIVE COUNSEL

As shown above, well-settled law requires that separate counsel be appointed to prosecute the derivative claims. *See supra* p. 5. The need for immediate appointment of derivative counsel is especially critical, as defendants are proceeding on the misimpression that Interim Class Counsel "has clear authority to act on behalf of plaintiffs in the Consolidated Derivative Cases …."[23] Moreover, even assuming that Interim Class Counsel could properly assert derivative claims (they cannot), they have not done so here.[24]

Movants' counsel, Milberg LLP and Seeger Weiss LLP should be appointed Co-Lead Derivative Counsel.[25] The firms represent plaintiffs in each of the derivative cases (*Morning Mist*, *Ferber* and *Pierce*). They have amply demonstrated their ability to vigorously litigate the

[23] Letter of Mark G. Cunha, Esq. to the Court, dated June 9, 2009, at 2.

[24] Letter of Robert C. Finkel, Esq. to the Court, dated April 24, 2009, at 1-2 ("[W]e are not asserting derivative claims at this time ….").

[25] Firm resumes of Milberg LLP and Seeger Weiss LLP are annexed to the accompanying declaration of Kent A. Bronson, Esq., dated June 23, 2009.

derivative claims in this Court (as well as related proceedings simultaneously proceeding in New York state court[26]), and have filed detailed derivative complaints against numerous defendants.

These firms, moreover, have already developed significant institutional knowledge, experience and expertise relating to the issues and claims involved here, and are prepared to commit substantial resources to continued good use in prosecuting the derivative claims. The high quality of counsels' work product, their demonstrated commitment to the pursuit of the derivative claims, and the fact that no other counsel has filed the derivative claims warrant the formal designation of movants' counsel as Co-Lead Derivative Counsel. *See In re Bear Stearns,* 2008 U.S. Dist. LEXIS 106327, *41.

CONCLUSION

For the foregoing reasons, the Court should vacate the Consolidation Order and designate movants' counsel as Co-Lead Derivative Counsel.

Dated: June 24, 2009

Respectfully submitted,

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[26] *See Morning Mist Holdings Ltd., et al. v. Fairfield Sentry Ltd.*, Index No. 601527/09; *Pierce, et al. v. GlobeOp Fin'l Serv. LLC*, Index No. 601250/09*; David I. Ferber SEP IRA v. GlobeOp Fin'l Serv. LL*C, Index No. 601251/09 (special proceedings pending in Supreme Court of the State of New York, County of New York)

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